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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-212

MILDRED FRANCIS-SOBEL, Petitioner

vs.

UNIVERSITY OF MAINE, et. al, Defendants

and

EVERETT O. WARE, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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and

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Mildred Francis-Sobel, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the First Circuit Court of Appeals, entered in the above-entitled case on May 3, 1979, which affirmed the dismissal of defendant Ware from petitioner's 42 U.S.C. §1985(3) action in the United States District Court of Maine, against Everett O. Ware, Stanley J. Freeman, Robert W. Coon, Winthrop Libby, James Clark, Howard R. Neville,

John C. Mairhuber, Carroll R. McGary, Lawrence M. Cutler, Stanley J. Evans, Stephen T. Hughes, James H. Page, Kenneth H. Ramage, Carlton D. Reed, Jean Sampson, Nils Y. Wessell, Bernard Carpenter, Frances A. Brown, John C. Donovan, Susan R. Kominsky, Robert R. Masterton, H. Sawin Millett, Thomas F. Monaghan, Cynthia A. Murray-Beliveau, Elizabeth S. Russell, Artemis Weatherbee, Lucia M. Cormier, Vaughn Currier, Ralph H. Cutting, Robert N. Haskell, and W. Gorden Robertson.

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals is as yet unreported and is printed in Appendix A hereto, infra, page 35. The judgment of the Federal District Court of the District of Maine, Southern Division, is printed in Appendix A hereto, infra, page 40-41. The Journal Entry of Judgment of the Federal District Court of the District of Maine, Southern Division, is printed in Appendix A hereto, infra, page 42-43.

JURISDICTION

The judgment of the First Circuit Court of Appeals (Appendix A, infra, page 35-39) was entered on May 3, 1979. A timely petition for rehearing was denied on June 11, 1979.

In a letter dated November 27, 1978, the clerk of the U.S. Court of Appeals for the First Circuit advised petitioner that the record on appeal was filed "today" and that ten copies of the brief for the appellant were due to befiled by January 2, 1979. Subsequently, oral argument

of matters raised by the appeal was heard on March 13, 1979. In a ruling dated May 3, 1979, the District Court's dismissal of petitioner's action against defendant Ware was affirmed. Petitioner timely filed a motion for enlargement of time in which to file a petition for rehearing. Petitioner's motion was granted. On June 11, 1979, Petitioner's petition for rehearing was denied and the First Circuit reaffirmed its decision of May 3, 1979.

The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1). Petitioner seeks to invoke the jurisdiction of the Court to review the Court of Appeals' affirmance of the District Court's dismissal of defendant Everett O. Ware, Director of the Boston District Office of the Equal Employment Opportunity Commission (EEOC).

QUESTIONS PRESENTED

I. Whether the Court of Appeals acted erroneously in affirming the District Court's dismissal of Everett O. Ware as defendant in petitioner's pro se complaint on the stated grounds, thus precluding any opportunity for petitioner by subsequent proof to establish a claim.

II. Whether a right of action for participation in a conspiracy mentioned in 42 U.S.C. §1985 to prevent petitioner, a Black citizen, from having and enjoying her constitutionally protected rights under 42 U.S.C. §1981, will not lie against a federal officer who, on account of racial animus, caused petitioner to receive unequal treatment from a state agency, and violated her Fifth Amendment "Due Process" rights in administering the law, and prevented petitioner from having and enjoying the protection of 42 U.S.C. §2000e-5 and the benefits of 42 U.S.C. §2000d.

III. Whether a right of action for participation in a conspiracy mentioned in 42 U.S.C. §1985 to prevent petitioner, a Black citizen, from having and enjoying her constitutionally protected rights under §1981, will not lie against a federal officer who in order to punish petitioner for exercising First Amendment rights caused her to receive unequal treatment from a state agency, and violated her Fifth Amendment "Due Process" rights in administering the law and prevented her from having and enjoying the protection of 42 U.S.C. §2000e-5 and the benefits of 42 U.S.C. §2000d.

STATUTES INVOLVED

Section 1985 of Title 42 of the United State Codes which created petitioner's direct cause of action against respondent, Everett O. Ware, provides, in pertinent part:

> §1985 (3) If two or more persons in any State conspire. . .for the purpose of depriving either directly or indirectly, any person. . .of the equal protection of the laws or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . .in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the

> United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 1981 of Title 42 of the United States Codes which creates constitutionally protected rights which were meant to be protected in the federal courts provides, in pertinent part:

> §1981 All persons within the jurisdiction of the United States shall have the same right in every State. . .to make and enforce contracts,. . .and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . .

STATEMENT OF THE CASE

A. How federal question is presented.

Petitioner, Mildred E. Francis-Sobel, a Negro citizen of Santa Fe, New Mexico, commenced this action in the United States District Court for the District of Maine, September, 1977. There are nineteen counts for civil right violations and acts of racial discrimination, including counts under 42 U.S.C. §§1981, 1983 and 2000e, et seq. and one conspiracy count under 42 U.S.C. §1985, and one count for sex based employment discrimination under 42 U.S.C. §2000e. In these twenty actions, petitioner seeks monetary, injunctive and declaratory relief against certain named defendants. Defendant Everett O. Ware, a federal officer, is named as a defendant in a conspiracy prohibited by 42 U.S.C. §1985(3) to deprive petitioner of having and enjoying rights secured under §1981.

B. Facts

Petitioner, age 40, is a Negro educator, scientist and statistician born in Washington, D.C.. She holds several degrees including a doctor of science degree from John Hopkins University awarded in 1966. Throughout her professional life she has been employed as a secondary school teacher, scientific researcher, statistical consultant, analyst and Assistant Professor in graduate schools of learning. Currently she is an independent consultant.

In the spring of 1970 petitioner's husband, Eugene L. Sobel, who is likewise a holder of a doctor's degree in statistics, accepted an offer of employment with the Department of Mathematics, University of Maine, and both subsequently moved to Maine. For four years thereafter, petitioner unsuccessfully sought to obtain access to equal employment opportunity for herself at the University of Maine. She met with and wrote numerous employees of the institution and informed them of her interest in obtaining professional employment, in accordance with the usual procedures of search for academic employment.

Petitioner failed to be accepted for any position even though she possessed better credentials than the white males who were accepted, and she claims that invidious racial discrimination caused her to be deprived of access to opportunities to practice her profession and vocation and that she suffered irreparable injury as a result.

First Administrative Complaint:

In March of 1972 petitioner filed her first administrative complaint with the Department of Health, Education and Welfare (DHEW), [amending the complaint in May of 1972] charging a pattern and practice of racial discrimination existed at the University of Maine.

After a preliminary investigation, and in response to her inquiry, DHEW advised the petitioner in August of 1972 that her charges had been deferred to the Boston District Office of the Equal Employment Opportunity Commission under the terms of an agreement reached between the two federal agencies. In the same month, the district director of the Boston District Office of the EEOC advised petitioner that her charges had been deferred to the appropriate 706 agency and that the EEOC had jurisdiction to investigate the six (6) acts and events of discrimination about which she had complained. Whenever the petitioner sought information about the status of the complaint, the EEOC district director and his subordinates, by word and deed, encouraged petitioner to believe the Commission was empowered to exercise jurisdiction over the acts and events complained of, to wit: (1) In January 1973, respondent Ware deferred the complaint for a second time to the state 706 agency and as a result, through his subordinate employees, induced the state agency officials to discriminatorily deny petitioner the benefits of the investigatory powers of the state agency; (2) In May 1973, respondent Ware advised petitioner by letter that the EEOC had jurisdiction to investigate the actions complained of; (3) An EEOC prepared statement summarizing petitioner's complaint for the Commission's purposes, was sent to petitioner in June, 1973 with a request to sign it so that the EEOC district office could commence its investigation of the actions complained of; (4) In August 1973, an employee of the EEOC district office interviewed petitioner about the actions complained of; (5) In a February 1975 letter, (Appendix A, infra, page 65) an employee of the Commission stated their "investigation on all charges filed" by petitioner would be concluded within a couple of months.

Although petitioner received these and other assurances that the Commission possessed jurisdiction to investigate the actions complained of, in October 1976, respondent Ware notified petitioner by letter that he had determined that the Commission lacked jurisdiction to investigate five of the six actions complained of in her first administrative complaint. Thus four and one half years after petitioner requested government investigation of the deprivation of rights, privileges and benefits secured to her by Title VI and Title VII of the Civil Rights Act of 1964, petitioner was told that no government agency might or could conduct any investigation of five of the six actions about which petitioner had complained.

With respect to the sixth discriminatory event petitioner complained of, the Commission had not then delegated to anyone their power and authority to make and issue a decision as to cause or no cause for the category of respondent named in petitioner's complaint. Nonetheless, respondent Ware issued a letter of determination and in so doing, petitioner claims, he caused her irreparable injury and loss.

Second Administrative Complaint

Petitioner filed a second administrative complaint with the Boston District Office of the EEOC in February of 1974 alleging that officials of the University of Maine had retaliated against her for having exercised her right to utilize the machinery set up by Title VII and had done so by denying her husband employment benefits and privileges to which he was lawfully and rightfully entitled and by making her husband's terms and conditions of employment so intolerable as to cause him to resign his position. Earlier, petitioner's husband had attempted to file on his own behalf a similar complaint but it was not

accepted. In February 1975, petitioner was led to believe by Commission employees that there would be an investigation of the matters complained of within a couple of months. No investigation of petitioner's second administrative complaint was ever initiated, attempted or completed by any employee or official representative of the Commission.

Third Administrative Complaint

Petitioner filed a third administrative complaint with the Boston District Office of the EEOC in May of 1974, amending her second administrative complaint. She complained that officials of the University of Maine had retaliated against her for utilizing the machinery set up by Title VII, and had done so by denying petitioner employment and access to opportunities to practice her profession and vocation to which she was lawfully and rightfully entitled, while granting less qualified white persons such opportunities and employment. Petitioner claimed that she was better qualified for the job vacancies, Staff Associate in Institutional Research and Associate Director of Health Science Education, than either of the white persons selected by all reasonable standards and that the standards and criteria which were utilized as a basis for determining job suitability did not conform with the obligations contained in Title VII, to not discriminate on the basis of race, and served to perpetuate in the present the consequences of prior discriminatory practices and policies of university officials.

Petitioner's requests to respondent Ware and his subordinates for acknowledgement of this complaint went unanswered. Through indirect means, petitioner learned in February 1975 (Appendix A, infra, page 65) that her

complaint had been deemed by the Commission to have been properly filed and that the matters complained of were scheduled for investigation within a couple of months. However, no investigation of the matters complained of was ever initiated, conducted or completed by any EEOC representative.

Congress limited the Commission's power and authority to issue a determination on cause or no cause to those issues and charges where there has been conducted "an investigation thereof" (See Constitutional Provisions and Statutes Involved, infra, page 79-82). Yet in October 1976, respondent exceeded his authority and the limits imposed on the Commission by Congress and statute, in that he made and issued a letter of determination when there had been no investigation of the actions complained of as required by Congressional mandate and Commission regulations, and he was proscribed by Commission regulation from issuing a letter of determination for the category of respondent named in petitioner's complaint. Moreover, petitioner claims the respondent failed and refused to apply Commission standards in determining whether an employee's selection procedures conform with the obligation contained in Title VII of the Civil Rights Act of 1964 (See Count 19, Appendix A, infra, page 59-60), and thus the determination was without a rational basis.

When petitioner requested respondent to rescind his letter of determination because he had acted outside the scope of his authority, respondent reacted by making and issuing a second unauthorized letter of determination. Petitioner claims that both unauthorized letters contained unfounded statements which maligned her training, ability, professional character, reputation and community standing. Respondent's derogatory comments were

communicated to others and placed in the public record without giving petitioner any opportunity to refute the false charges and as a result, petitioner claims she suffered irreparable injury and loss.

The District Court's Decisions

Petitioner, acting pro se, commenced these proceedings in September 1977 against respondent and thirty-five other parties and properly effectuated service of summons, complaint and written interrogatives upon all parties prior to December 1, 1977. All defendants motioned for a protective order. A hearing on motions and conference of councel was scheduled. At the January 1978 hearing, the district court refused to allow petitioner's discovery, by granting each defendant a protective order. Concurrently, the district court directed that petitioner's pro se complaint be dismissed for failure to comply with Rule 8 of the Federal Rules unless petitioner timely filed an amended complaint "without the evidentiary material which is contained in the present Amended Complaint". No conference of counsel was held.

Petitioner refiled her complaint. Respondent moved for dismissal for failure to state a claim upon which relief can be granted on the ground that: (1) the doctrine of official immunity protects him from civil liability for his wrongful conduct; (2) the doctrine of qualified immunity protects him from civil liability for his wrongful conduct; (3) the doctrine of qualified immunity protects him from civil liability; (4) petitioner's constitutional rights were not violated by his wrongful conduct. A hearing on respondent's motion to dismiss was held on September 6, 1978. Petitioner filed a Second Amended Complaint upon oral motion at the hearing. Without review of petitioner's Second Amended Complaint, the district court granted

respondent's motion to dismiss with prejudice petitioner's action against him ruling that "there is no sufficient allegation in this Complaint which would permit this Court to infer that the actions of the defendant Ware in any way deprived the petitioner of any constitutional right." The action was dismissed by the District Court without the filing of an answer by any defendants, including the respondent. Except for petitioner's pleading, the only pertinent documents before the District Court were submitted under petitioner's affidavits and are presented in Appendix A, infra, pages 65-67.

The U.S. Court of Appeals Decision

On May 3, 1978, the District Court's dismissal of Count Nineteen as against the respondent was affirmed. (See Opinion of the U.S. Court of Appeals for the First Circuit of May 3, 1979, Appendix A, infra, pages 35-39).

REASONS FOR GRANTING THE WRIT

1. A Decision On This Issue By The Court Would Affect A Large Number of People

The Civil Rights Act of 1964 represents one of the most sigificant acts of legislation passed in recent years. Title VII of the Civil Rights Act makes it an unlawful employment practice for an employer to engage in certain enumerated forms of discrimination on the basis, inter alia, of race.

What Congress had in mind when it passed Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e) was perhaps most straightforwardly expressed in *Culpepper v. Reynolds Metal*, 421 F. 2d 888, 891 (5th Cir. 1970): "Title VII of the 1964 Civil Rights Act provides us with a clear

mandate from Congress that no longer will the United States tolerate this form of discrimination."

For Negro persons, the enactment as well of Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d) in combination with the provisions of Title VII represented a congressional promise of federal protection against invidious discrimination, ultimately secured only by the opportunity for the aggrieved to litigate in the courts. One question raised by this petition is whether that promise can be rendered meaningless and the intent of Congress hampered by the failure and refusal of EEOC officials to follow the statute and Commission regulations in the administrative processing of individual charges under Title VII. Overwhelmingly, the facts of this case evidence both have occurred. The Court of Appeals characterized the administrative processing of petitioner's complaints by the regional EEOC office as "worse than useless" (Court of Appeals' Opinion, Appendix A, page 36). Nonetheless, the Court of Appeals stated that not even the "arbitrary and capricious denial of the investigative and conciliatory benefits the EEOC can provide to a charging party", in its opinion, "transgresses the Due Process Clause." Clearly, this conclusion is based on the presumption that EEOC officials have no duty whatsoever, under the law, to make sure the Act works to achieve the purposes Congress intended.

It is dificult for petitioner to think that Congress intended to confer on every EEOC investigator and staff person the right to arbitrarily and capiciously create and choose what policies and rules to follow in carrying out the Congressional mandate. To so hold would be to say that Congress gave to investigators and staff, powers it carefully withheld from Commission members. Such a holding defies logic and reason.

Petitioner submits that the Court of Appeals has misread the applicable law as to the EEOC's role in the statutory scheme. Having required every citizen who believes that he/she has been harmed by the racial discriminatory employment practices and policies of an employer, to file an administrative complaint before the Commission in order to gain access to the *right* to maintain a Title VII action in court, petitoner thinks that Congress did not intend to confer on Commission employees and staff, and could not under the Constitution do so, an unfettered right to determine willy nilly when and if the statutory provisions of the law and Commission regulations are to be followed in processing an individual's charge.

> "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule of law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 179 (1951) (Douglas, J., concurring opinion).

Petitioner submits that EEOC officials have a duty and responsibility to make sure the Act works to achieve the purpose Congress intended and must follow the statute and Commission regulations and guidelines in administering the law. A decision by this Court on the issue of the duty owed by EEOC officials to a charging party is of utmost importance and would affect a large class of current and future aggrieved persons.

2. The Court of Appeals erroneously took judicial notice that petitioner suffered no loss of rights or interests which proper EEOC processing might have provided. Such a dispositive conclusion could not be judicially noticed.

Petitoner submits there was gross abuse of the lawful powers of his office by the respondent who discriminatorily deprived her of the benefits of federal protection from invidious discrimination. The Court erred by accepting as fact the good faith of the respondent and agency "attempts to bestow a benefit provided by Congress." There was no evidence before the courts from which such a finding could be properly made. No answer had been filed by any party when the District Court dismissed respondent from Count Nineteen. There was no opportunity afforded petitioner to contest the probative facts assumed in that conclusion. *Scheuer v. Rhodes,* 416 U.S. 233, 249, 250 (1973).

The Court of Appeals construed the petitioner's allegations of respondent's conduct as a "picture of bureaucratic inefficiency and disregard of proper procedure that might give rise to an inference of bad faith." Pursuant to the principles in *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), "that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief", it must be concluded that petitioner's action against respondent was incorrectly dismissed. The issue before the Court below was not whether petitioner would ultimately prevail but whether she was entitled to be heard more fully than is possible on a motion to dismiss a complaint and to offer evidence to support her claims. The Court of Appeals has apparently

given petitioner's complaint an extremely restrictive reading and assessed its sufficiency by applying inappropriate standards. This is particularly so considering that petitioner is a pro se litigant and as such the utmost liberality should be given to her in the reading of her Complaint.[1]

A look at Count Nineteen of petitioner's Second Amended Complaint reveals that she has set forth sufficient facts to satisfy the burden of pleading under 42 U.S.C. §1985(3). For example, after petitioner alleged the existence of an ongoing conspiracy by the other named defendants to deprive her of her rights provided under 42 U.S.C. §1981, (which action is still proceeding against the other defendants), petitioner alleges that "defendant Ware knowingly joined and entered into the unlawful conspiracy and combination. . ." (Count Nineteen, Appendix A, infra, page 58). Petitioner goes on to allege specific acts in furtherance of said conspiracy done by the respondent,

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[1] See *Slaven v. Curry,* 574 F.2d 1256 (5th Cir. 1978); *Mount v. Book-of-the-Month Club, Inc.* 555 F.2d 1108 (2nd Cir. 1977). One of the noteworthy indicators that the Court of Appeals applied most stringent criteria is the conclusion they reached after stating what they perceive to be defects of petitioners statement of a claim under 42 U.S.C. §1985(3), to wit:

> "Appellant has had ample opportunity to cure the defect and has failed to do so. We can only conclude that there is nothing more to be said." (Opinion of the U.S. Court of Appeals for the First Circuit of May 3, 1979, Appendix A. infra, page 37).

Petitioner's action, in its present posture, does not permit a determination as to whether petitioner has had ample opportunity to cure any alleged defects in the pleading. The District Court acted before answers were filed and without any evidence other than the copies of the "Memo of Record to Defendant Freeman, dated May 8, 1972" and the "Letter of Record to the Honorable William Hathaway, dated February 12, 1975" (which had been set forth in affidavits filed by petitioner).

including inter alia: (1) He violated his statutory duty pursuant to Title VII and EEOC regulations to notify the other defendants within ten days, and instead waited 822 days, delaying petitioner's right to get to Court; (2) He failed to give petitioner the required notification and failed to use ordinary care in carrying out the administrative procedures of Title VII, with a purpose to protect the other defendants; (3) He violated both the letter and spirit of the statute and regulations by making and issuing a determination both without the investigation required by 42 U.S.C. §2000e-5(b) and without actual jurisdiction to do so (because a district director is limited in the authority to issue determinations to matters on which there is Commision precedent). *EEOC v. Raymond Metal Products Co.,* 530 F.2d 590 (4th Cir. 1976.)

The Federal Rules of Civil Procedure permitted petitioner to amend her Complaint at least once, as of course. Simply because petitioner availed herself of an opportunity which the Federal Rules allow trained attorney's, provides no justification for such a dispositive conclusion. Further, the Court of Appeals had before it the transcript of the hearings held on January 11, 1978 at which time the District Court had stipulated that petitioner's amended complaint would be found to violate Rule 8 unless she removed the evidentiary material from the pleading. In addition, the District Court had completely barred petitioner's discovery on any of the issues and matters relating to the twenty counts set forth in her complaint. Petitioner was afforded no opportunity to contest the facts assumed in the dispositive conclusion that petitioner has had ample opportunity to cure any defects in the pleading.

Lastly, the grounds given by the District Court for granting respondent's motion to dismiss on their face do not appear similar to those considered by the Court of Appeals. (See Excerpts of Transcript at hearing on Various Motions, on September 6, 1978, Appendix A, infra, page 75-76) Petitioner did set before the District Court and in her pleading, factual support of the existence of a conspiracy under §1985(3) to deprive her of 1981 rights. This is the matter raised by the District Court's dismissal of petitioner's Count Nineteen but this matter was not considered by the Court of Appeals.

Petitioner says that in doing these acts and things among others, respondent deprived petitioner of statutory and constitutional rights of having and enjoying the full and equal benefit of Title VI and Title VII of the Civil Rights Act of 1964, as well as other laws and proceedings for the security of persons and property enjoyed by white persons. Petitioner, therefore, submits that she has stated a claim against respondent and should be allowed to go forward against him. *Conley v. Gibson,* 355 U.S. 41 (1957). The primary question in this litigation is not difficult to state: Can a federal officer's total disregard of the requirements of the statute and Commission regulations and guidelines deprive a Black citizen, who is an aggrieved person under the Act, of rights granted by the Constitution and laws? Petitioner submits that under the particular circumstances of this case, the respondent's total disregard of proper procedure and his abuse of his office caused her to be deprived of "the same right. . .to the *full* and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens", a statutory right created by 42 U.S.C. §1981. It is because the Court of Appeals erroneously accepted as fact that petitioner lost no rights or interests which proper EEOC processing might have provided that the Court reached the conclusion that petitioner's Count Nineteen "does not state a compensable claim for relief under the federal constitution". There was no opportunity afforded petitioner to contest the facts assumed in that conclusion. There was no evidence before the courts from which such a finding could properly be made.[2] The documents properly before

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2. At a hearing on other motions as well as the respondent's motion to dismiss (Portions of Transcript of Proceedings At Hearing On Various Motions On September 6, 1978, Appendix A, *infra,* pages 73-74), the District Court did not wish to hear or consider evidence about what rights or interests proper EEOC processing might have provided to petitioner. Less than 45 seconds after petitioner had been given leave to present her opposition to respondent's motion to dismiss, the Court interjected as follows:

> The Court: Dr. Sobel, the EEOC, and specifically Mr. Ware, found probable cause with respect to one of your charges.
>
> Dr. Francis-Sobel: With respect to — yes, with respect to one of the events of the 1972 charges.
>
> The Court: How in these circumstances — what caused you to feel that he is racially motivated or discriminating?
>
> Dr. Francis-Sobel: First, you Honor, the letter —
>
> The Court: I understand your certain allegations against the University of Maine, but as far as Mr. Ware is concerned, he is the EEOC employee who found in your favor on one ***

During the next 45 seconds, the Court changed the issue by stating "Frankly, and I am serious about this, Dr. Sobel, I do not see how you were prejudiced because you had the right to bring an action in this Court regardless of what action Mr. Ware took", and closed the petitioner's presentation thusly:

> The Court: Just how were you prejudiced, *quickly?*
>
> Dr. Francis-Sobel: I will go on, you Honor.
>
> The Court: Well, *quickly.*
>
> Dr. Francis-Sobel: Yes, I'm sorry. I filed them in '74 and for two years there was no response to my filings. Defendant Ware has now placed in a public document a statement which I consider an attack upon my good name, my reputation, my honor and my standing in the community. Defendant Ware was not authorized to issue a determination on any of the Complaints which I filed in '74.
>
> The Court: All right, thank you.
>
> (Emphasis added.)

the District Court at this early pleading stage specifically place in issue the facts assumed in that conclusion.

Among the rights and interests petitioner lost that proper EEOC processing would have provided are (1) Federal protection against invidious discrimination; (2) Having

and enjoying the same access to benefits of programs receiving federal financial assistance as is enjoyed by white citizens, including the Emergency Employment Acts program; (3) Equal access and opportunity to the protection of the panoply of Commission enforcement powers; (4) Availability of potential administrative relief from unlawful employment practices; (5) Right to protection against unequal treatment by a state; (6) Right to protection against arbitrary action by federal officer.

For Negro citizens, loss of such rights and interests are sufficiently serious to amount to a grievous loss and Congress has provided petitioner and members of her class a legal remedy to vindicate such losses by the provisions of the Civil Rights Act of 1866. In plain and unambiguous terms, Section 1981 of the Civil Rights Act of 1866 grants to all citizens "the same right" to the full and equal benefit of all laws and proceedings "as is enjoyed by white citizens". Petitioner submits that Congress "plainly meant to secure that right against interference from any source whatsoever, whether governmental or private.". *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). While *Jones v. Alfred H. Mayer Co.* involved the application of §1982 of the Civil Rights Act of 1866, it is clear that the rationale of the decision also applies to its companion §1981. An implied right of action against the respondent can and should be found in §1981 of the Civil Rights Act of 1866. If federal bureaucrats, not answerable to the electorate, can refuse to properly perform their duties to execute thelaws against employment discrimination, Title VII's promise of federal protection and administrative relief from invidious discrimination is an empty promise.

The issue of a federal official's duty concerns every black person in this country, as well as every person whoever has or ever will go before the EEOC. Because it

impacts on so many lives, the Supreme Court should hear this issue.

3. The decision below conflicts with principles established by this Court and the Circuit Courts of Appeal.

In affirming the District Court's decision, the Court of Appeals focused on one of the laws (specifically, the Fifth Amendment to the U.S. Constitution) whose full and equal benefits petitioner claims she lost as a result of respondent's unlawful abuse of his office and total disregard of proper procedure. In its opinion the Court of Appeals asserts that petitioner's claim that the respondent injured her reputation interest is "groundless". Petitioner does have a property and liberty interest in her reputation if such is maligned without due process (*Wisconsin v. Constantineau,* 400 U.S. 433 (1971); *McNeil V. Butz,* 480 F.2d 314 (4th Cir. 1973); *Sims v. Fox,* 505 F.2d 857 (5th Cir. 1974); *Paskaly v. Seale,* 506 F.2d 1209 (9th Cir. 1974)).

The Court of Appeals erroneously judicially noticed that the letter of determination which respondent unlawfully issued "merely" contained "a neutral evaluation". In the circumstances of this case, such a dispositive conclusion could not be judicially noticed. Whether or not petitioner was "wrongfully stigmatized" by the untrue and unsupported derogatory information contained in the respondent's letter of determination is a matter on which petitioner is entitled to be heard more fully than is possible on a motion to dismiss a complaint. (*Arnett v. Kennedy,* 416 U.S. 134 (1974)).

Petitioner submits that, where a federal official is mandated by a federal remedial statute to proceed in a manner prescribed by Congress to achieve the objectives and purposes of that statute and refuses to do so, the person for the benefit of whom the statute was passed suffers

grievous loss. The Court of Appeals' opinion that there is no ground for relief against respondent at all is based on a misconstruction of the purposes Congress intended to achieve by enacting Title VII. The Court of Appeals seems to say there is no ground for relief against respondent at all, mainly because petitioner has the right to go to court after an EEOC determination has been issued.

The Court's opinion ignores the holding of *Macklin v. Spector Freight Systems,* 478 F.2d 979 (D.C. Cir. 1973), to the effect that the primary objective of Title VII is conciliation, not litigation; that such interests are liberty and property as conceived by the Due Process Clause (*Paskaly v. Seale,* 506 F.2d 1209 (9th Cir. 1974); *Shaw v. Hospital Authority of Cobb County,* 507 F.2d 625 (5th Cir. 1975); *Franklin v. Shields,* 569 F.2d 784 (4th Cir. 1977), cert. denied, __U.S.__, 98 S.Ct. 1659 (1978)). The Court provides no grounds or reasons but concludes that a charging party who files an administrative complaint under Title VII is not entitled to any procedural protections from arbitrary action by the government. Such protections have been deemed by the Court to be "tangential" to the "central thrust" of petitioner's Title VII rights.[3] The Court's conclusion inexplicably presumes that the true thrust of Title VII is a *de novo* action. Petitioner submits that the

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[3] Specifically, the Court of Appeals commented as follows:

> "The interests themselves have not been lost, only the help that Congress intended charging parties receive in vindicating those rights. We think that such statutory rights, if they be 'liberty or property' at all within the meaning of the Due Process Clause, are so tangential to the central thrust of Title VII rights — for the deprivation of which Congress *did* provide a remedy — that an implied right of action cannot and should not be found here."

(Opinion of the U.S. Court of Appeals for the First Circuit of May 3, 1979, Appendix A, *infra,* page 39)

cases cited by the Court to support this contention are inapposite to the case at bar and therefore do not determine a ruling on the situation.

> "[A]n administrative charge of discrimination is not filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge of discrimination is to trigger the investigatory and conciliatory procedures of the EEOC."(*Sanchez v. Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1970).

The Court of Appeal's opinion ignores such cases as *Edmunds v. E.I. du Pont de Nemours and Co.,* 315 F. Supp. 523 (Kans. 1970); *United States Gustin-Baron, et al.,* 426 F.2d 539 (10th Cir. 1970); *EEOC v. Westvaco,* 372 F. Supp. 985 (Md. 1974); and *EEOC v. Raymond Metal Products Co.,* 530 F.2d 590 (4th Cir. 1976), which hold that the EEOC's duties are mandatory and that procedures and time limits should be followed as strictly as possible.

Moreover, even though respondent's total disregard of proper procedures caused petitioner to be delayed four and one-half years in obtaining the right to go to court to pursue ner claims under Title VII, the Court of Appeals did not think that any harm, injury or burdern had been sustained or any interest lost by petitioner. However, a quite similar situation confronting the Eight Circuit elicited a quite different appraisal.

> "If a remedy is to be meaningful to a working person who claims and proves employment discrimination, certainly he should be afforded relief on his complaint in a much shorter period than five and one-half years, else pursuing the claim may prove more burdensome than ignoring the violation of his rights."

(*Lowry v. Whitaker Cable Corp.,* 472 F.2d 1210 at 1211 (8th Cir. 1973)). Plaintiff submits that the rights meant to be protected under the "laws and proceedings" clause of 42 U.S.C. §1981 are not confined simply to the right to

initiate a judicial action. A decision by this Court on the duty owed by EEOC officials to charging parties is of extreme importance and would clarify the rights of a large class of current and future charging parties.

4. The Court of Appeals' opinion misreads petitioner's claim and overlooks denial to petitioner of highly important constitutional and statutory rights. If the Court's opinion stands, it will be easier to deny others their rights.

Petitioner has stated a claim for conspiracy under 42 U.S.C. §1985, charging respondent with conspiring with others to deprive petitoner of her rights under 42 U.S.C. §1981 to have and enjoy the "full and equal benefit of all laws and proceedings as is enjoyed by white citizens". The particular rights and interests which petitioner claims she lost full and equal benefit to are as follows: (1) Her rights to procedural due process under the Fifth and Fourteenth Amendments to the U.S. Constitution; (2) Freedom to exercise her right to petition the government for redress of grievances under the First Amendment to the U.S. Constitution without fear of punishment; (3) Her right to the protection of proper procedure and access to equal employment opportunity under 42 U.S.C. §2000e-2 and §2000e-5; (4) Her right to be free from retaliation for attempted use of EEOC procedures, under 42 U.S.C. §2000e-3; and (5) Her right to participate in and benefit from federal programs at institutions receiving federal financial assistance, under 42 U.S.C. §2000d.

Yet, the Court of Appeals completely misread petitioner's contentions concerning §1981, and instead summarized her claim as one under §1983 rights (Court of Appeals' Opinion, Appendix A, p. 38).

Section 1981 is the foundation of petitioner's claim under Count Nineteen of her Complaint. The difference between §1981 and §1983 is extremely important, although the Court of Appeals seemed to make light of it. While respondent's conduct and behavior may indeed ground an action for deprivation of rights, privileges and immunities under color of state law, nevertheless, petitioner has chosen, in Count Nineteen, to proceed under §1985 for a deprivation of her rights, to equal benefit of all laws and procedings as is enjoyed by white citizens, enumerated under §1981. The other statutory and constitutional provisions cited above, aside from grounding claims for relief, are the laws and proceedings of which petitioner is claiming denial.

Section 1981 is of extreme importance, both today and historically. It was created and passed to give the newly freed slaves an opportunity to have and enjoy the equal protection that was supposed to be guaranteed to them by the Fourteenth Amendments' due process and equal protection clauses, as well as the Fifth Amendment's due process clause.

Due process is the cornerstone of democratic rights. The requirement of procedural due process permeates the whole of American society when liberty and property are involved (as it must, according to the Fifth and Fourteenth Amendments). It is fairly well established that there can be no due process without reasonable notice and a fair hearing. *MacKenna v. Ellis,* 263 F.2d 35 (5th Cir. 1969). When a government creates a right, it must afford procedural due process before denying that right to any person. Government cannot discriminatorily deprive persons of such rights or benefits. See *Goldberg v. Kelly,* 397 U.S. 254 (1970), holding that a person receiving welfare

benefits under statutory and administrative standards defining eligibility has a liberty interest in continued receipt of benefits, and therefore a proper hearing was required before an adjudication was allowed.

The Court of Appeals admitted that the EEOC's assistance to petitioner was "worse than useless". (Court of Appeals Opinion, Appendix A, p. 36). Yet the Court held that this did not ground an action. The logical extension of this holding is that federal officials are above the law and need not follow the mandates of federal statutes. Section 706 of Title VII (U.S.C. §2000e-5) is replete with the word "shall", describing EEOC duties. "Shall" is a word which denotes a mandatory duty, not a permissive or directory duty, the latter of which is usually denoted by the word "may". *Wisconsin's Environmental Decade, Inc. v. Wisconsin Power and Light Co.,* 395 F. Supp. 313 (Wis. 1975); *EEOC v. Westvaco,* 372 F. Supp. 985 (Md. 1974). It is obvious, therefore, that Congress intended that the EEOC have an affirmative duty to assist complainants pursuant to proper procedures, set forth in §708 and corresponding EEOC regulations. In §703 of Title VII, Congress granted to persons in petitioner's class the right to equal employment opportunity, and it is not constitutionally permitted to take it away from petitioner without due process. Respondent's actions certainly did not follow the mandates of statute and regulation, and therefore respondent denied petitioner due process.

Aside from Title VII, the right to pursue an occupation is a liberty interest (*Shaw v. Hospital Authority of Cobb County,* 507 F.2d 625 (5th Cir. 1975)), as is the right to be free from governmental infliction of damage to reputation without due process (*Paskaly v. Seale,* 506 F.2d 1209 (9th Cir. 1974)). It is no answer, as the Court of Appeals contends, that there is not denial of due process because petitioner has the right to go to Court and get a de novo adjudication. Aside from the fact that petitoner was delayed for four and one-half years before she was allowed to go to court, and was damaged by this long period of being unable to continue her career in academia while having her reputation injured by respondent's failure to follow proper procedure, the effect of the Court's opinion is to rewrite Title VII by inserting the word "may" every time there is a "shall'. And it ignores the case law which holds that the EEOC process is of utmost importance and is not merely a procedural stepping stone to court. *Lowry v. Whitaker Cable Corp.,* 472 F.2d 1210 (8th Cir. 1973); *Macklin v. Spector Freight Systems,* 478 F.2d 979 (D.C. Cir. 1973); *Dent v. St. Louis-San Francisco Ry. Co.,* 406 F.2d 399, appeal after remand; *Hyler v. Reynolds Metal Co.,* 434 F.2d 1064, (5th Cir. 1970) *cert. denied,* 403 U.S. 912, *rehearing denied,* U.S. 875 (1971) (5th Cir. 1969). The issue is therefore of compelling importance and affects every black citizen and every complainant before the EEOC.

The Court of Appeals' opinion, in effect, holds that EEOC officials may delay processing charging party's complaint for 4½ years and have a license to refuse to follow regulations requiring an investigation to be made as a prerequisite to a determination and confining a district director's authority to issue a determination to those cases where there exists Commission precedent. This contention does not square with cases such as *Edmunds v. E.I. du Pont de Nemours and Co.,* 315 F. Supp. 523 (Kans. 1970) and *United States v. Gustin-Baron et. al.,* 426 F. 2d 539 (10th Cir. 1970), which hold that the EEOC has a duty to expedite matters as quickly as possible. The Court of Appeals' contention that petitoner was not deprived of any

benefits would make sense if petitioner had the choice of going before the EEOC or court. However, considering the prerequisite of going before the EEOC, the logical extension of the Court's opinion is that EEOC officials have the right to willfully delay a complainant's access to redress of grievances. This cannot be what Congress intended. Petitioner has alleged that this delay was done willfully and in concert with others to further the conspiracy of the named defendant parties, and petitioner should be accorded the chance to prove such at trial. Denial of the opportunity to prove such at trial will affect every person who goes before the EEOC.

Petitioner has also alleged that she and her husband were the victims of retaliation after petitioner filed her first administrative complaint in 1972, contrary to §704 of Title VII (42 U.S.C. §2000e-3). Without this section, many persons would fear to lodge a discrimination complaint, since complainants are generally in a weaker position than employers, and it is for that reason that Congress included that section.

> ". . .[W]e think it is clear from the language of the statute that Congress sought to protect employees and job applicants from employer retaliation for filing complaints to the EEOC. Those who have the courage to challenge discriminatory practices of an employer merit that protection. . ." *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 341 (8th Cir. 1972)

Petitioner has alleged that respondent not only denied her the EEOC procedural protection against retaliation, but that he also joined in on the retaliatory scheme to further the conspiracy of the other defendants. Petitioner should be permitted to prove her allegations. Because of the extreme possibility of retaliation, this issue is also of extreme

importance to every EEOC complainant, and an upholding of the Court of Appeals' opinion would substantially weaken the protection of §704.

Petitioner also alleges that respondent's actions denied her the benefit of Title VI protection (42 U.S.C. §2000d) which provides that "no person in the United States shall on the ground of race, color or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance". Further, it is clear that Title VI was passed to protect persons in petitioner's class.

Despite the holdings of some cases hinting that a private citizen may have a private right of action under Title IX (which is of the same wording as Title VI, except that Title IX prohibits sex discrimination), *Cannon v. University of Chicago,* 559 F.2d 1063 (7th Cir. 1976), held that there was no private right of action under Title IX, and that the cases implying that there was such a private right of action were actually claims under §1981 or §1983 for deprivation of Title IX rights. *Alvarado v. El Paso School District,* 445 F.2d 1011 (5th Cir. 1971); *Kelly v. Altheimer Public School District,* 378 F.2d 483 (8th Cir. 1967); *Cypress v. Newport News General and NonSectarian Hospital Ass'n.,* 375 F.2d 648 (4th Cir. 1967). Since the weight of authority says that petitioner may not maintain a private right of action under Title VI, petitioner was entirely dependent on federal officials to protect her rights. For the Court of Appeals to now hold that petitioner may not maintain an action against the respondent, who pursuant to agreement with HEW was required to investigate petitioner's allegations, is to hold that an important remedial statute like Title VI is sterile and of no effect, since federal officials are free to violate it and ignore it. This is not what Congress intended when it passed Title VI.

The Court of Appeals misapprehends the theory upon which petitioner relies in setting forth her action against the respondent and the other parties named in Count Nineteen. Petitioner's claim against respondent arises under the theory that he engaged in a conspiracy prohibited by §1985(3) with unnamed persons (not named in this action) for the purpose of depriving petitioner both directly and indirectly of rights secured under the "laws and proceedings" clause of 42 U.S.C. §1981 - and particularly that he engaged in a private conspiracy to cause petitioner, a black citizen, to receive unequal treatment from a state agency. It is a generally accepted fact that such a conspiracy would violate 42 U.S.C §1985(3). *United States v. Guest,* 383 U.S. 745 (1966); *Griffin v. Breckenridge,* 403 U.S. 88 (1971). The nexus between respondent and the state agency employees engaged in the unlawful scheme is clearly set forth in paragraphs 22(c). 29(b) and 30 of Count Nineteen (Count Nineteen, Appendix A, page 54, 56, 57). Petitioner claims that the respondent did such things having full knowledge of a plan and scheme among the university defendants to deprive petitioner of her civil rights [4], with the purpose and objective to further said conspiracy.

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[4] At the hearing on respondent's motion to dismiss, petitioner introduced by affidavit a memo obtained from the respondent's files which evidences that the respondent knew of the existence of university defendants' conspiracy as early as 1974. The memo was dated May 8, 1972, and was addressed to one of the university defendants (Stanley J. Freeman) named in Count Nineteen. The Memo discussed the subject "Institutional Research Position". (See Memo of Record to Defendant Freeman, Appendix A, *infra*, page 63.) Therein, a top administrative assistant to Defendant McNeil, also named in Count Nineteen, outlined what strategies might be considered to assure the success of the conspiracy to deprive petitioner of the same right to make and enforce contracts as is enjoyed by white citizens and stated:

Petitioner does not contend that the university defendants conspired directly with the respondent, but rather that they conspired with unnamed persons and at least some of the same officials of a state agency, to cause petitioner to receive unequal treatment from that state agency and thus to be deprived of rights secured under the "laws and proceedings" clause of 42 U.S.C. §1981. The factual allegations providing the nexus between the named university defendants and the state agency are set forth in paragraphs 22(b) and 23 in Count Nineteen of petitioner's Second Amended Complaint.

Thus the nexus between respondent and the university defendants is established. Petitioner's theory that there existed two conspiracies to cause her to receive unequal treatment from a state agency is entirely plausible and the existence of evidence on the record which shows that respondent knew that an illegal combination and scheme to deprive petitioner of §1981 rights had been implemented by university defendants cannot be ignored. Petitioner is entitled to the opportunity to establish proof of her claim, and it was injudicious of the District Court to allow its personal view that petitioner's allegations were implausible to temper its duty to notice that sufficient factual allegations were made.

Further, there is simply no basis for interpreting 42 U.S.C. §1985 as requiring petitioner to assert an action against all or any persons with whom respondent

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> "We still have the problem of Mildred Sobel. The Chancellor wrote her saying that he had made a decision — as if everything was final. Could she think that since she was the runner-up candidate (in her mind) she should now be offered the position? Do we now have to consider her as a candidate all over again? How will she react to the new public announcement of the position?"

There was no public announcement of the availability of the position.

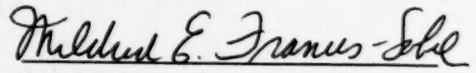
conspired in order to effect the object of the conspiracy. On the contrary, the statute provides that petitioner may bring an action "against any one or more of the conspirators". It must be presumed that respondent is responsible for the actions of his subordinates, and at the very least knew of and countenanced their actions. Petitioner has satisfied her burden by alleging that he knew of the ongoing conspiracy and then setting forth the overt acts which respondent performed in furtherance of said conspiracy.

The foregoing constitutional and statutory provisions, allegedly denied to petitioner, clearly demonstrate that the federal officials involved, supervised by respondent, did absolutely nothing to protect petitioner in her rights. The logical extension of the Court of Appeals' opinion is that such federal officials have no duty to aid persons in petitioner's position, that federal officals may do as they like to aid or not to aid. In effect this opinion rewrites Title VII, replacing all the "shall"s with "may"s, and negates most of its provisions, giving them a totally different meaning than originally intended. As such the opinion affects every black person in the United States, every minority, every person covered by the various civil rights provisions, every person who is the victim of discrimination, and every person who goes before the EEOC, as well as other federal agencies. The issues involved in this petition are extremely important vis-a-vis civil rights in the United States, and this Court should rule on the issues presented. Therefore, this Court should issue its writ of certiorari to review the decision of the First Circuit Court of Appeals.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,



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United States Court of Appeals
For the First Circuit

No. 78-1507

MILDRED E. FRANCIS-SOBEL,
PLAINTIFF, APPELLANT,

v.

UNIVERSITY OF MAINE,
EVERETT O. WARE, et al.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
[HON. EDWARD T. GIGNOUX, U.S. District Judge]

Before, COFFIN, *Chief Judge,*
BOWNES, *Circuit Judge,*
PETTINE*, *District Judge.*

Reese P. Fullerton, on oral argument.

Mildred E. Francis-Sobel, on brief, pro se.

Vincent Blackwood, Attorney, Equal Employment Opportunity Commission, with whom *Issie L. Jenkins,* Acting General Counsel, *Joseph T. Eddins,* Associate General Counsel, and *Beatrice Rosenberg,* Assistant General Counsel, were on brief, for Everett O. Ware, appellee.

May 3, 1979

COFFIN, *Chief Judge.* This is an appeal from a district court's dismissal of a civil rights action for failure to state a claim upon which relief can be granted. We affirm.

* Of the District of Rhode Island, sitting by designation.

Appellant sued the University of Maine, its trustees, and various university officials, alleging that the university discriminated against her on account of race and sex in filling a number of administrative positions in violation of 42 U.S.C. §§1981, 1983, 1985(3), 2000e. Appellant also sued the Boston Regional Director of the Equal Employment Opportunity Commission, appellee Everett O. Ware. Finding that appellant's original and two amended complaints failed to state claims against defendant Ware, the district court dismissed him as a defendant and certified the judgment of dismissal pursuant to F.R.C.P. 54(b). This appeal ensued.

The factual basis of the appellant's grievance against appellee revolves around difficulties involved in the administrative processing of appellant's Title VII complaints by the regional EEOC office. Taking all of the appellant's factual allegations to be true, *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), the assistance rendered to appellant by the EEOC was worse than useless. Appellant filed her first complaint with the EEOC on March 31, 1972. There then ensued a game of jurisdictional ping pong in which the EEOC and the Maine Human Rights Commission shuffled her complaint back and forth without acting on it. In May of 1973, the EEOC, through defendant Ware, finally asserted jurisdiction over the complaint. An investigation providing appellant an opportunity to be heard was held in August of 1973.

In February of 1974, appellant filed a second complaint with the EEOC, alleging further discrimination in hiring by the University of Maine and retaliatory discharge of her husband from the university faculty. The EEOC was strangely silent about the 1974 complaint, failing to notify appellant of its filing, failing to notify the university of the charges, and failing to respond to numerous requests from

appellant for action. Finally, in September of 1976, the EEOC began processing the complaint. After fifteen days, and without an investigation, the EEOC, through appellee Ware, disclaimed jurisdiction over a number of the charges, found reasonable cause to believe a violation had occurred as to one charge, and found no reasonable cause as to the rest.

We have carefully reviewed the several hundred pages of pleadings filed by appellant in the district court in an effort to discern a federally cognizable claim. Appellant's arguments boil down to essentially two theories: that appellee conspired with the university to deprive appellant of statutory and constitutional rights in violation of 42 U.S.C. §1985(3) and that appellee's total disregard of the validity and proper handling of appellant's EEOC complaints gives rise to a *Bivens* inplied right of action under the due process clause of the Fifth Amendment. We treat each theory separately.

Focusing first on conspiracy, we find appellant's pleadings devoid of any factual allegations that would tend to link appellee with the university defendants. Appellant sets forth an impassioned picture of bureaucratic inefficiency and disregard of proper procedure that might give rise to an inference of bad faith. But nowhere is a fact alleged that indicates the university's involvement with the EEOC. Pleading conspiracy under sections 1983 & 1985(3) requires at least minimum factual support of the existence of a conspiracy. *Slotnick v. Stavinskey,* 560 F.2d 31 (1st Cir. 1977); *Harrison v. Brooks,* 519 F.2d 1358 (1st Cir. 1975). Appellant has had ample opportunity to cure the defect and has failed to do so. We can only conclude that there is nothing more to be said.

The attempt to find a right of action implied in the federal constitution raises the question whether an

agency's less than useful attempts to bestow a benefit provided by Congress can be so unhelpful as to violate a constitutional right. We think such is not the case here. Insofar as appellant's arguments are veiled attempts to obtain judicial review of the correctness of appellee's negative determination, it is clear that we have no power to provide redress. *Georator Corp. v. EEOC,* No. 78-1161 (4th Cir. Feb. 23 1979); *Archie v. Chicago Truck Drivers,* 585 F.2d 210, 221-22 (7th Cir. 1978). More important, we think the agency's action neither deprived the appellant of any interest she may have had independent of the EEOC nor denied her such substantial EEOC-administered benefits as to give rise to a constitutional claim.

Appellant complains that the EEOC "held" her 1981, 1983, and 1985(3) claims against the university until the statute of limitations had expired. Although the record does not reveal whether or not the statute of limitations will be a problem, if it is, appellant must bear the blame. Appellant was free to sue under these statutes irrespective of EEOC processing. *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975). Appellant's Title VII complaints could be and will be tried out *de novo,* EEOC processing having been completed. Appellant's complaint that appellee injured her reputation interest is similarly groundless. Appellee's letter finding no reasonable cause stated merely that persons hired in appellant's stead "possessd qualifications more in line with their respective positions than did the Charging Party." Such a neutral evaluation is not a deprivation of a liberty interest no matter how undue the process which leads a governmental offical to make the evaluation. *Willens v. University of Massachusetts,* 570 F.2d 403 (1st Cir. 1978).

There remains to be considered any interest appellant may have lost which proper EEOC processing might have provided. Because a determination of reasonable cause is non-binding and nonfinal, investigative and not adjudicative, we cannot say that the failure to receive such a determination represents any loss that implicates the Due Process Clause. *See Georator Corp. v. EEOC, supra.* Nor do we think that even arbitrary and capricious denial of the investigative and conciliatory benefits the EEOC can provide to a charging party transgresses the Due Process Clause in a way that would support the implication of a damage remedy. Unlike *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), this case involves the loss of alleged statutory rights to administrative assistance in the vindication of underlying, fundamental statutory and constitutional interests. The interests themselves have not been lost, only the help that Congress intended charging parties receive in vindicating those rights. We think that such statutory rights, if they be "liberty or property" at all within the meaning of the Due Process Clause, are so tangential to the central thrust of Title VII right—for the deprivation of which Congress *did* provide a remedy—that an implied right of action cannot and should not be found here. Indeed, were we to find that the right to EEOC assistance is protected by an implied right of action found in the Fifth Amendment, then every federal bureaucrat would be subject to judicial review of the most minute aspects of his responsibilities as they affect members of the public. Such is a task we are neither eager nor constitutionally competent to undertake.

Because the complaint does not state a compensable claim or relief under the federal constitution, there was noneed for the district court to decide what type of immunity might be available to appellee. *See Butz v. Economou,* U.S.L.W. 4952, 4960 (June 29, 1978).

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
SOUTHERN DIVISION

MILDRED E. FRANCIS-SOBEL,	)	
Plaintiff	)	
	)	
v.	)	
		CIVIL NO. 77-203 SD
UNIVERSITY OF MAINE,	)	
EVERETT O. WARE, et al,	)	
Defendants	)	

JUDGMENT

Pursuant to the Order entered by the Court on September 7, 1978, judgment is hereby entered for the Defendant Everett O. Ware, dismissing the action against him with prejudice and without costs.

ELIZABETH SAX, Clerk

Nunc pro tunc
as of September 7, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
SOUTHERN DIVISION

MILDRED E. FRANCIS-SOBEL,	)	
Plaintiff	)	
	)	
v.	)	
	)	**CIVIL NO. 77-203 SD**
UNIVERSITY OF MAINE,	)	
EVERETT O. WARE, et al,	)	
Defendants	)	

ORDER FOR DISMISSAL AS TO DEFENDANT WARE PURSUANT TO RULE 54B

The Court having granted the Motion of Defendant Everett O. Ware to dismiss this action as against him and having determined that there is no just reason for delay, directs that judgment be entered for the Defendant dismissing the action against him with prejudice and without costs.

ELIZABETH SAX, Clerk

Dated: September 6, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
SOUTHERN DIVISION

MILDRED E. FRANCIS-SOBEL,	)	
	)	
	)	
v.	)	
	)	**CIVIL NO. 77-203 SD**
	)	
	)	
UNIVERSITY OF MAINE, ET ALS	)	

CERTIFICATE

I, Elizabeth Sax, Clerk of the United States District Court for the District of Maine, hereby certify that the following described and indexed documents constitute the original papers filed in the above proceeding and forwarded pursuant to Rule 11(a) and (b) of the Federal Rules of Appellate Procedure and Notice of Appeal to the United States Court of Appeals for the First Circuit from the Order for Dismissal as to Defendant Ware Pursuant to Rule 54B of the United States District Court entered September 6, 1978:

VOL. I	No.A	Clerk's Certificate dated November 21, 1978, with index.
VOL. II	1	Complaint
VOL. III	2	Transcript of Bench ruling of the Court upon various matters in the above-entitled action, hearing had 1/11/78.

VOL. IV	3	Transcript of Proceedings in open court with respect to a Conference of Counsel and the Plaintiff with the Court, etc., held 1/11/78.
VOL. V	4	First Amended Complaint
VOL. VI	5	Motion to Dismiss as to defendant Everett O. Ware
VOL. VII	6	Transcript of Proceedings at Hearing on various Motions, 9/6/78
VOL. VIII	7	Order for Dismissal as to Defendant Ware Pursuant to Rule 54B, Gignoux, J., 9/7/78
	8	Judgment
	9	Notice of Appeal

In testimony whereof, I hereunto set my hand and affix the Seal of said District Court at Portland, Maine, this 21st day of November, 1978.

ELIZABETH SAX, Clerk

COUNT NINETEEN

Conspiracy to Violate Plaintiff's Civil Rights

1. This Court has jurisdiction over the subject matter of this suit and this action is brought pursuant to Section 2 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1985, to enjoin the activities of the defendants hereinafter recited and to recover damages for the injuries sustained by plaintiff by reasons of the defendants' activities, done in furtherance of a conspiracy mentioned in Section 1985, Title 42 of the United States Code.

2. Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sections 1343 and 1331. This Court is empowered to grant declaratory relief by 28 U.S.C. Sections 2201, 2202. The matter in controversy exceeds, exclusive of costs and interests, the sum of $10,000.

3. The acts and conduct of the defendants hereinafter referred to constitute a combination and conspiracy for the purposes of depriving, directly and indirectly, plaintiff of equal privileges and immunities under the laws, particularly under the First and Fifth Amendments of the Constitution of the United States and 42 U.S.C. §1981, §2000e-3, and §2000d, and said conspiracy was motivated by racial animus.

Parties

4. Plaintiff, Mildred E. Francis, is an Afro-American and citizen of the United States and presently resides in the State of New Mexico.

(a) From July 1970 until July 1974 she was a citizen of the State of Maine and attempted through systematic and lawful means to secure professional employment within the University of Maine.

(b) She had obtained a sufficient educational and experience level to qualify for employment in professional staff positions within the University of Maine which became vacant during the time she was a citizen of the State of Maine.

5. The defendants are as follows:

(a) Defendant Everett O. Ware is, on information and belief, a citizen of the State of Massachusetts and at least from March 23, 1973 until the present time was Acting District Director and District Director of the District Office of the Equal Employment Opportunity Commission in Boston, Massachusetts;

(b) Defendant Donald R. NcNeil is, on information and belief, a citizen of the State of California and, at least from July 1969 until December 1974, was Chancellor of the University of Maine;

(c) Defendant Stanley J. Freeman is, on information and belief, a citizen of the State of Maine and, at least from July 1969 until December 1974, was Vice-Chancellor for Academic Affairs of the University of Maine.

(d) Defendant Robert W. Coon is, on information and belief, a citizen of the State of West Virginia and, at least from December 1973 until December 1974, was Assistant Chancellor for Health Science Education of the University of Maine;

(e) Defendant Winthrop Libby is, on information and belief, a citizen of the State of Maine and, at least from July 1969 until August 1973, was President of the University of Maine at Orono;

(f) Defendant James Clark is, on information and belief, a citizen of the State of Maine and, at least from July 1969 until the present time, has been Vice President for Academic Affairs of the University of Maine at Orono;

(g) Defendant Howard R. Neville is, on information and belief, a citizen of the State of Maine and, at least from August 1973 until the present time, has been President of the University of Maine at Orono;

(h) Defendant John C. Mairhuber is, on information and belief, a citizen of the State of Maine and, at least from July 1969 until December 1974, was Chairman of the Department of Mathematics of the University of Maine at Orono;

(i) Defendant Carroll R. McGary is, on information and belief, a citizen of the State of Maine and, at least from July 1970 until December 1974, was Commissioner of Education of the State of Maine and a member of the Board of Trustees of the University of Maine;

(j) Defendants Lawrence M. Cutler, Stanley J. Evans, Stephen T. Hughes, James H. Page, Kenneth H. Ramage, Carlton D. Reed and Jean Sampson are, on information and belief, citizens of the State of Maine and, at least from September 1971 until December 1974, were duly constituted members of the Board of Trustees of the University of Maine;

(k) Defendant Nils Y. Wessell is, on information and belief, a citizen of the State of New York and, at least from September 1971 until December 1974, was a duly constituted member of the Board of Trustees of the University of Maine;

(l) Defendants Bernard Carpenter, Francis A. Brown, John C. Donovan, Susan R. Kominsky, Robert R. Masterton, H. Sawin Millett, Thomas F. Monaghan, Cynthia A. Murray-Beliveau, Elizabeth S. Russell, and Artemis Weatherbee are, on information and belief, citizens of the State of Maine and, at least from September 1976 until September 1977, were duly constituted members of the Board of Trustees of the

University of Maine. Defendant Millett was also Commissioner of Education of the State of Maine during his term as a member of the Board of Trustees of the University of Maine;

(m) Defendants Lucia M. Cormier, Vaughn Currier, Ralph H. Cutting, Robert N. Haskell, and W. Gordon Robertson are, on information and belief, citizens of the State of Maine and, at least from September 1971 until June 1972, were duly constituted members of the Board of Trustees of the State of Maine.

6. During his employment as an officer, agent or employee of the University of Maine, each of the defendants named in paragraphs 5(b) through 5(h), inclusive, had delegated authority and responsibility for carrying out and administering the policies, promulgations and regulations of the corporation, the University of Maine. Each of the defendants is held personally responsible, by the corporation for the operation and effective administration and implementation of policies over certain domains, activities and units of the corporate structure known as the University of Maine.

7. During his or her term of office as a member of the Board of Trustees of the University of Maine, each of the defendants named in paragraphs 5(i) through 5(m), inclusive, (hereafter referred to as "Trustee defendants"), was vested with the responsibility for the management, control and conduct of the instructional, administrative and financial affairs of the University of Maine.

8. Upon information and belief, all of the defendants are citizens of the United States.

9. All of the defendants are sued as individual persons in their individual capacities.

10. The defendants are properly joined herein by virtue of Rule 20 of the Federal Rules of Civil Procedure in that

Plaintiff properly asserts rights to relief against the defendants, jointly and severally, and her rights to relief arise out of the same transactions and occurrences, and questions of law and fact common to all defendants will arise in this action.

11. Most of the acts hereinafter complained of occurred, were committed or performed within the State of Maine.

Offenses Charged

12. Beginning sometime before November 1971 and continuing thereafter at least until the present, the exact date of beginning to the plaintiff unknown, the defendants Libby, Freeman and McNeil with full knowledge of the facts of the laws against racial discrimination did knowingly and unlawfully combine, conspire and agree and have a tacit understanding together with each other and with divers other people to preclude and prohibit plaintiff from obtaining employment opportunities in the lines of progression and for managerial administrative positions equal to those opportunities provided for similarly qualified white persons.

13. It was part of said combination and conspiracy, and the object and purpose thereof to accomplish the following:

(a) to continue, maintain and preserve the white male image, composition and predominance of the professional staff of the University of Maine; and

(b) to prevent plaintiff and other black persons from enjoying equal rights, privileges and immunities of citizens under the laws of the United States, including such rights as the exercise of petition without interference and freedom of speech secured by the First Amendment to the U.S. Constitution; and the same

right to make and enforce contracts as is enjoyed by white citizens, as provided by 42 U.S.C. §1981; and

(c) to punish plaintiff for the exercise of her petition rights and freedom of speech as guaranteed by the First Amendment to the U.S. Constitution.

14. Acts and things done pursuant to the aforesaid conspiracy had the following discriminatory effects upon plaintiff:

(a) All sources and means of economic support enabling plaintiff to live in the State of Maine were threatened and extinguished;

(b) Plaintiff was deterred from submitting applications for jobs for which she was qualified to perform;

(c) On each occasion plaintiff applied for a job for which she was qualified, the "University of Maine site experience" was invoked to hire a less or equally qualified white applicant.

15. Relief is sought against each and all defendants as well as all persons acting in concert or cooperation with them or at their direction. Plaintiff retains the right to amend this complaint to name each individual acting in concert or cooperation with the aforesaid defendants in the offenses hereinafter charged when the names of said individuals are hereafter discovered.

16. Defendants Ware, Coon, Clark, Mairhuber, Neville, F.A. Brown, Carpenter, Cormier, Currier, Cutter, Donovan, Evans, Haskell, Hughes, Kominsky, Masterton, McGary, Millett, Monaghan, Murray-Beliveau, Page, Ramage, Ree, Robertson, Russell, Sampson, Weatherbee and Wessell entered and joined into the aforesaid plan, scheme and conspiracy to deprive plaintiff of the basic rights that the law secures to all persons at the time and in the manner herinafter set forth in paragraphs 17 through 36, inclusive.

Facts Giving Rise to Cause of Action as to University Defendants

17. Upon information and belief, in July 1971, defendants Libby, Freeman and McNeil advised the Trustee defendants, those defendants named in paragraph 14 who were then duly appointed members of the Board of Trustees of the University of Maine, of the results of a staff study of the University of Maine's non-discrimination policy and plaintiff's interest in and applications forequal employment opportunity. Agreement was reached on a course of action to follow to thwart plaintiff's endeavors to obtain equal employment opportunity.

18. Pursuant to the arrangements and agreements set forth in paragraphs 12 and 13 hereinabove, the University defendants deliberately adopted and applied recruitment methods and employment selection standards to fill extant professional staff position vacancies which discriminated against black persons because of their race and color, in violation of Executive Order 11246 and the regulations promulgated thereunder and of 42 U.S.C. §2000d. The diverse means and methods used by defendants to accomplish their unlawful purpose include, but are not limited to, the unlawful practices and methods enumerated in Counts One through Eighteen, inclusive.

19. Pursuant to the arrangements and agreements set forth in paragraphs 12 and 13 hereinabove, plaintiff was precluded by the University defendants on numerous occasions from obtaining employment for which she was qualified and trained to perform. In particular, plaintiff was denied positions with the University of Maine in five instances on account of her race and color, in direct violation of 42 U.S.C. §1981, to wit:

(a) With respect to the position Assistant to the Vice-Chancellor for Academic Affairs, the racial discrimination against plaintiff occurred during November 1971 when the defendants Freeman and McNeil, and duly

appointed Trustee defendants hired a less qualified white male to fill the position for which plaintiff was fully qualified and had applied. The defendants accomplished their unlawful purpose by performing the discriminatory acts enumerated in Count One of this Complaint.

(b) With respect to the position Adjunct Appointment as visiting scholar in the Department of Mathematics, the act of racial discrimination against plaintiff occurred in January of 1972 when the defendants Clark and Libby refused to allow plaintiff's bid for an adjunct staff appointment to be judged on the basis of merit and qualifications and disqualified plaintiff from receiving such an appointment because of her race and color. Defendant Clark knowingly entered into the aforesaid unlawful combination and effectuated its objectives by carrying out the discriminatory actions enumerated in Count Three of this Complaint.

(c) With respect to the position Director of Institutional Research, Chancellor's Office, the act of racial discrimination against plaintiff occurred in April 1972 when the defendants Freeman and McNeil and the duly appointed Trustee defendants selected a less qualified white male to fill the position for which plaintiff was fully qualified and had applied. The defendants accomplished their unlawful purposes by carrying out the discriminatory actions enumerated in Count Seven of this Complaint.

(d) With respect to the position vacancy Staff Associate-President's Office, occurring in September 1973, the racial discrimination against plaintiff occurred, upon information and belief, in May 1974 when the available positions had been filled serially and concurrently by white persons less qualified than plaintiff to

perform the functions and duties of the positions by defendants Fitzgerald and Neville in collaboration with defendant Libby. Defendants Neville and Fitzgerald knowingly entered into the aforesaid unlawful combination and effectuated its objectives by carrying out the discriminatory acts enumerated in Count Thirteen of this Complaint.

(e) With respect to the position Associate Director of the Institute for Health Science Education, the racial discrimination against plaintiff occurred, upon information and belief, in March 1974 when the available position had been filled by defendant Coon in collaboration with defendants Freeman and McNeil. Defendant Coon knowingly entered into the aforesaid unlawful combination and effectuated its objectives by carrying out the discriminatory acts enumerated in Count Fifteen of this Complaint.

20. Plaintiff was fully qualified for each of the positions enumerated above, by all reasonable standards and alleges that the defendants committed, controlled, managed and directed the aforesaid acts of racial discrimination in their individual and personal capacities, since such activities have never been considered (1) as among the duties and responsibilities of the officers of the University of Maine; or (2) as constituting the correct discharge of the duties of officers of the University of Maine; or (3) within the authority and power of a person filling an office of the corporate structure.

21. To accomplish the objects and purposes described in paragraphs 12 and 13 hereinabove, the defendants formulated and effectuated intimidating measures for economic retaliatory actions against plaintiff, in reprisal for her exercise of First Amendment Rights secured by the United States Constitution and which had as its objective

deterring and preventing her from further exercise of such rights. Specfically, to punish plaintiff for the exercise of her petition rights and freedom of speech as secured by the First Amendment to the Constitution and in direct violation of Title VII §703(a), 42 U.S.C. §2000e-3, the defendants conspired to perpetrate and effectuate:

(a) Disparate treatment and constructive discharge of plaintiff's husband from his employment with the University of Maine, which commenced after plaintiff had complained to the officers of the University of Maine that the extant employment practices and policies discriminated aginst her because of her race or color and sex. Defendant Mairhuber knowingly entered into the aforesaid conspiracy and effectuated its objectives by the acts and conduct described in Count Nine of this Complaint. The decision made by defendants Libby, Clark and Mairhuber, sometime in or before March 1973, to renew plaintiff's husband's contract for one year only while granting similarly accomplished, experienced and qualified faculty three year contracts or promotion to a tenured position was arbitrary, capricious and unlawful and intended to cause plaintiff and her husband irreparable injury professionally and economically.

(b) Excluding plaintiff from obtaining employment which she was qualified to perform while hiring less qualified white persons. The defendants accomplished their unlawful purpose through the acts, methods and conduct enumerated in Count Six, Count Nine, Count Twelve and Count Sixteen of this Complaint.

22. In formulating and effectuating the aforesaid conspiracy, the University defendants were aided and abetted by employees and agents of the state and federal governments, to wit:

(a) With respect to the Commissioner of Education of the State of Maine, this state official actively

participated in the racial discrimination against plaintiff by affirmatively approving the series of discriminatory actions and practices challenged in this Complaint while serving as a member of the Board of Trustees of the University of Maine.

(b) With respect to the Maine Human Rights Commission, this state agency was influenced by the defendants to discriminatorily apply its powers and authority and refuse to investigate plaintiff's charge that she had been denied employment positions at the University of Maine because of her race and color. Upon information and belief, the Chairman of the Maine Human Rights Commission cast the deciding vote against commencing an investigation of plaintiff's charge. This state official was also employed by the University of Maine as "Lecturer in Physical Education and Freshman Football Coach" and had received same appointment soon after the defendants learned that plaintiff had officially filed an administrative complaint of racial discrimination, in September of 1972.

(c) Representatives of the Equal Employment Opportunity Commission actively and successfully sought to influence the Maine Human Rights Commission to promulgate a ruling excluding plaintiff from enjoying the benefits, advantages and protections of the state law prohibiting racial discrimination in employment.

23. The actions of the defendants, as described above, were for the purpose and had the effect of indirectly depriving plaintiff of the equal protection of the laws and the equal privileges and immunities under the laws and violated plaintiff's right to equal protection as guaranteed by the Fourteenth Amendment to the Constitution.

24. Plaintiff avers that had a fair and impartial evaluation of her training, qualifications and credentials been

performed in accordance with basic and elemental standards of meritocracy and quality of professional experiences, it would demonstrate with substantial and credible evidence that the refusal to employ or recommend her appointment to said positions was because of her race and color and because of her exercise of constitutional and statutory rights and was in no manner whatsoever related to her ability or probable job performance.

25. All of the actions of defendants Clark, Coon, Neville, Fitzgerald, Mairhuber, Libby, Freeman and McNeil were taken with the approval of the duly appointed members of the Board of Trustees, who had knowledge of the intent of the actions.

26. As a proximate result of the illegal actions of defendants alleged above, plaintiff has been deprived of employment at the University of Maine since November 1971 and has suffered a loss of income, reputation and opportunity to pursue her chosen profession.

Facts Giving Rise to Causes of Action Against Defendant Ware

27. In an administrative complaint filed on March 31, 1972 with the DHEW and later deferred by that agency to the Boston District Office of the Equal Employment Opportunity Commission (EEOC), plaintiff sought agency investigation of the recruitment practices and methods utilized by the agents and employees of the University of Maine in filling professional staff positions. In this 1972 Administrative Complaint, plaintiff sought federal agency investigation of the procedures and standards followed in at least four instances, to wit:

(a) Director of Student Aid, University of Maine at Orono, which position was filled in July 1971.

(b) Assistant to the Vice-Chancellor for Academic Affairs, which position was filled in November of 1971 although plaintiff did not discover said fact until February of 1972.

(c) Director of Equal Employment Opportunity, Chancellor's Office, which position was filled in January 1972.

(d) Director of Institutional Research, Chancellor's Office, which position was not yet filled.

28. In a letter dated August 31, 1972 plaintiff was notified by the director of the Boston District Office of the EEOC, James Nunnes, that her complaint had been deferred to the Maine Human Rights Commission for the required period of time and that the EEOC "now has jurisdiction to proceed in the matter". A copy of said letter is attached hereto and marked Exhibit G.

29. In January of 1973 plaintiff wrote the Director of the Boston District Office of the EEOC to inquire when and if the agency planned to investigate the procedures and practices set forth in her 1972 Administrative Complaint. The response was as follows.

(a) In a letter dated March 5, 1973, plaintiff was informed by the District Director that the EEOC was unable to assume jurisdiction over the activities complained of until the matters were deferred to the Maine Human Rights Commission for 60 days.

(b) EEOC agents and representatives persuaded the staff of the Maine Human Rights Commission to return plaintiff's 1972 Administrative Complaint to the EEOC due to lack of jurisdiction in the area of sex discrimination.

30. On May 23, 1973 plaintiff was notified by the defendant Ware, as Acting District Director, that plaintiff's 1972 Administrative Complaint had been deferred to

the responsible State agency for the required period of time and that the EEOC "now has jurisdiction to proceed in the matter". Defendant Ware knew or had reason to know that various acts of unlawful conduct contained in the record before the EEOC were not within the EEOC's jurisdiction.

31. In August of 1973 an agent, employee or representative of the EEOC commenced an investigation of plaintiff's 1972 Administrative Complaint. Plaintiff received written notice of the pending inquiry and opportunity to participate in the inquiry.

32. In February of 1974, plaintiff filed a second administrative complaint with the Boston District Office of the EEOC, complaining that University officials had engaged in retaliatory acts of discrimination against plaintiff, in violation of Title VII, Section 704(a). In May of 1974 plaintiff amended her 1974 Administrative Complaint, charging that she had been denied employment on at least two occasions because of her race and color and because she had utilized the tool and proceedings made available under Title VII, 42 U.S.C. §2000e, et seq. In her 1974 Administrative Complaint, plaintiff alleged that she was subject to disparate treatment and acts of reprisal by the defendants which had as its objective deterring her from continuing to participate in Title VII proceedings, in that:

(a) With respect to the position Staff Associate, President's Office, University of Maine at Orono, racially biased employment selection criteria and methods were applied to select a white applicant, less qualified than plaintiff to perform the functions and duties of the job.

(b) With respect to the position, Associate Director for the Institute of Health Science Education, racially biased employment selection criteria and methods were

applied to select a white applicant, less qualified than plaintiff to perform the functions and duties of the job.

33. Beginning some time before June 1, 1974 and continuing thereafter at least until the present, the exact date of beginning to the plaintiff unknown, defendant Ware knowingly joined and entered into the unlawful conspiracy and combination described in paragraphs 12 and 13 of this Count. He knew or had reason to know of the objects and purposes of the unlawful scheme and agreement and in furtherance thereof performed acts and engaged in conduct violative of plaintiff's rights to due process as guaranteed by the Fifth Amendment to the United States Constitution. Such acts and things included, but are not limited to, the following:

(a) Defendant Ware was required to apprise plaintiff as to whether the 1974 Administrative Complaint contained such information and charges in such form as the Commission required to be deemed filed before the Commission, by reason of the duties imposed upon him by Sections 1601.5 and 1601.8 of the EEOC Regulations and Guidelines and his duty to exercise ordinary care in carrying out the administration and enforcement of Title VII. Despite repeated requests from plaintiff, defendant Ware never sent or caused to be sent to plaintiff the required notification. Therefore defendant Ware violated both duties and was negligent.

(b) Section 1601.13 of the EEOC Regulations and Guidelines and Section 706(b) of Title VII, 42 U.S.C. §2000e et seq. requires that notice of charges be sent to the parties named therein within 10 days of receipt of the charges by the EEOC. Defendant Ware did not serve notice on the persons named in plaintiff's 1974 Administrative Complaint until more than 822 days had elapsed from the time the EEOC received said charges.

By said conduct defendant Ware exceeded the legal power and authority of a federal officer and violated his duty to exercise ordinary care in carrying out the administation and enforcement of Title VII and was negligent. Defendant Ware's actions were forbidden by statute and thus are considered individual and not the conduct of the sovereign.

(c) There was no attempt made by defendant Ware, any agent or representative of the EEOC to commence processing of plaintiff's 1974 Administrative Complaint until after September 22, 1976. Nonetheless without any prior notice or explanation to plaintiff and within a span of only 15 working days, the processing of plaintiff's 1974 Administrative Complaint commenced and ended with a written determination dated October 13, 1976 and signed by defendant Ware. Having failed or refused to conduct an investigation of the matter complained of, defendant Ware wrongfully and arbitrarily issued a determination with respect to the matter set forth in plaintiff's 1974 Administrative Complaint. The language of Title VII, Section 706(b) clearly restricts his powers to issue a determination until after the conduct of an investigation of a charge. By issuing said determination defendant Ware exceeded his statutory authority, failed to exercise ordinary care in carrying out the administration and enforcement of Title VII, and was grossly negligent.

(d) The principle of disparate treatment set forth in Section 1607.11 of the EEOC Regulations and Guidelines also describes the bases upon which officers of the EEOC are to decide whether a complainant was subjected to disparate treatment by an employer. Defendant Ware completely disregarded applicable law and

EEOC regulations on when disparate treatment occurs and unlawfully promulgated a ruling based on his personal judgement, uninformed by facts, to discredit, impugn, disparage and otherwise harm plaintiff. The actions of defendant Ware were without a rational basis.
(e) On numerous occasions in 1972, 1973 and 1974, plaintiff asked the EEOC if and when it intended to issue a determination on the matters raised in plaintiff's 1972 Administrative Complaint. The final requests were made in September 1974 and February 1975. In March 1975 *(sic)* an agent or representative of the EEOC stated that the lack of commission precedent decision had delayed the processing of plaintiff's 1972 Administrative Complaint but that the investigation was scheduled for completion in the spring. In October of 1976 defendant Ware issued a determination that the Commission lacked jurisdiction to investigate all except one of the acts of discrimination set forth in plaintiff's 1972 Administrative Complaint. This action evidences that defendant Ware's previous actions were arbitrary and unreasonable and were designed to deprive plaintiff of the equal benefits and protections of the laws prohibiting racial discrimination in employment.

34. The actions of the defendant Ware, as described above, deprived plaintiff of "liberty" without due process, in violation of the Fifth Amendment to the United States Constitution.

35. Plaintiff avers that the aforesaid actions were undertaken by defendant Ware for the purpose of indirectly depriving plaintiff of equal employment opportunity and of the protection of 42 U.S.C. §§1981, 1983, 2000d, 2000e et seq.

36. As a proximate result of the alleged actions of defendant Ware, as alleged above, plaintiff has suffered a loss of income, reputation and opportunity to pursue her chosen profession.

37. Plaintiff takes the position that the appropriate statute of limitations applicable to this action is the general six-year statute of limitations for civil actions, 14 M.R.S.A. §752. Also, plaintiff takes the position that the said limitation rule did not begin to run until October 13, 1976.

38. As a proximate result of the defendants' unlawful combination and conspiracy, plaintiff has suffered irreparable injury and deprivation of her earnings and earning power until now and will suffer the same for an indefinite period of time in the future, all to her great detriment and loss. Plaintiff was compelled to expend considerable resources to vindicate her claim to those basic rights that the law secures to all free persons, of which she has been deprived by reason of the unlawful conspiracy and schemes of defendants. She has had wrongfully imposed upon her a stigma which tends to foreclose her future employment at other state or private institutions of higher learning and as a consequence her earning capacity has been decreased and diminished, all to her special damage in the sum of $350,000, according to proof to be offered at trial.

39. The acts, conduct and behavior of defendants and each of them were performed knowingly, intentionally, and maliciously, by reason of which plaintiff is entitled to an award of punitive damages in the sum of $350,000.

WHEREFORE, plaintiff respectively prays this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expediated *(sic)* and on such hearing to this Court, that it:

A. Permanently enjoin each defendant, their agents, attorneys and those acting in concert with them from

engaging in each of the unlawful practices, policies, customs and usages set forth herein, and from continuing any and all other practices shown to be in violation of applicable law; and

B. Award plaintiff damages in the amount of $700,000;and

C. Award plaintiff reasonable costs and disbursements of this action; and

D. Grant plaintiff such other and further relief as may be just.

September 22, 1978

Mildred E. Francis-Sobel
Plaintiff pro se
122 Sombrio Drive
Santa Fe, New Mexico 87501
(505) 983-7643

May 8, 1972

To: Herbert L. Fowle, Jr.
Stanley L. Freeman, Jr.

From: Aims McGuinness

Subject: Institutional Research Position

This is essentially a repeat of what I told Herb over the telephone this afternoon. I thought I would put it in writing as a reminder to myself and to inform the Chancellor.

(1) The Chancellor does not intend to attempt to persuade Paul Dunham to change his mind.

(2) The Chancellor said, when about to get on the plane to Washington, that we should reissue the job notice. The notice should be revised to remove the stipulation regarding experience at the University of Maine. The Chancellor suggested that we might now consider going national in the search for someone at about the $15,000 level. He asked if we could find a way to contact the national institutional research association for possible candidates.

(3) Since Stan worked on the previous search, he is to be responsible for the new search.

(4) The Chancellor wants to know if any of the candidates we considered and rejected in the earlier search could be reconsidered.

(5) Is there any chance that Ian Douglas could be Director of Institutional Research. If so, chould Stan call him in for initial interviews with Freeman and Fowle. To the Chancellor's knowledge, Ian still does not have a position.

(6) We still have the problem of Mildred Sobel. The Chancellor wrote her saying he had made a decision — as if everything was final. Could she think that since she was the runner-up candidate (in her mind) she should now be

offered the position? Do we now have to consider her as a candidate all over again? How will she react to the new public annoucement of the position?

Both Herb and Stan will be in Augusta at 9:30 a.m. Wednesday, May 10, for a meeting with the Chancellor prior to the Faculty Liaison Council meeting and what to do about institutional research can be discussed then.

cc: Chancellor McNeil
William N. Robersen
Ruth Benson

Equal Employment Opportunity Commission
Washington, D.C. 20506

February 12, 1975

Honorable William D. Hathaway
United States Senate
Washington, D.C. 20510

Dear Senator Hathaway:

This is with further reference to your inquiry in behalf of Mrs. Mildred E. Francis (who also indentifies herself as Mildred E. Francis Sobel in her correspondence with this Commission) regarding her charges of employment discrimination filed with our Boston District Office (File Nos. TB01-103 and TB04-1329).

As you were previously advised by this office, a report on this matter was requested from our Boston District Office. We have now received that report and this correspondence outlines the chronology and current status.

The original charge was filed with the Office of Civil Rights of the Department of Health, Education, and Welfare in the spring of 1972 and was transmitted to our Boston District Office by that agency in August of 1972.

The original charge was assigned to an investigator in June of 1973 and, after amendment, was served on the University of Maine on July 23, 1973. Due to the nature of the case and the extensive analysis required of the documents submitted by the Charging Party, the case was not yet completed when a subsequent charge was filed in

February of 1974, with an additional amendment being received in May of 1974.

We do have a heavy charge backlog in our Boston District Office. However, current scheduling of investigative staff will allow the investigation of all charges filed by Ms. Francis to continue and hopefully to be concluded during the first week of March of this year.

I would also want you to know that since the respondent against which Ms. Francis filed her charges is an institution of higher learning, the Commission's eventual decision as to cause or no cause will need to be issued out of our headquarters office inasmuch as there is as yet no established body of Commission Decision Precedents for that category of respondent.

I hope that his report is helpful to you in replying to your constituent. Please let me know if I can be of further assistance.

Sincerely,
Edgar Morgan
Director
Office of Congressional Affairs

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
SOUTHERN DIVISION

MILDRED E. FRANCIS-SOBEL,	)	
Plaintiff	)	
	)	
v.	)	
	)	**CIVIL NO. 77-203 SD**
UNIVERSITY OF MAINE,	)	
EVERETT O. WARE, et al,	)	
Defendants	)	

TRANSCRIPT OF PROCEEDINGS AT HEARING ON VARIOUS MOTION (On September 6, 1978).

Pursuant to Notice, hearing was had in the above-entitled action before Hon. Edward T. Gignoux, Judge, United States District Court, District of Maine, at the United States Courthouse, Portland, Maine, on Wednesday, September 6, 1978, at which time the following proceedings were had:

APPEARANCES:

For the Plaintiffs: (Pro se)

For Defendants University of Maine et als.: Barnett I. Shur, Esq., Portland
George Shur, Esq., Portland
Gordon F. Esq., Portland
Mary Schendel, Esq., Portland

For Defendant Ware: Anthony J. DeMarco, Esq., Washington,D.C.

(In open Court at 3:30 o'clock p.m.)

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THE COURT: Good afternoon, Counsel, and Dr. Sobel. I apologize for the delay in resuming but, as local counsel may know, my sister was married at noon today, and I did have to stay for some of the festivities.

This is a scheduled hearing on various pending motions in Civil Action No. 77-203, Southern Division, the action of Mildred E. Francis-Sobel, Plaintiff, v. University of Maine, et als, Defendants.

The Court, in preparation for the hearing, has reviewed the First Amended Complaint as filed by the Plaintiff on June 5th of this year and the various pending motions and briefs as follows:

First, the motion of the Defendant, University of Maine, and all other Defendants save the Defendant Ware, for a protective order to the effect that they will not be obligated to file any responsive pleadings or motions to the Amended Complaint until 60 days after a final ruling by this Court on the Rule 8 Motion to Dismiss filed on June 21, 1978. Sufficient cause appearing, that Motion is granted, and the Clerk will so endorse the original motion. * * *

Page 34, 35, 36

THE COURT: The problem here is that you have alleged in this Complaint that you were not aware of the fact the University of Maine had discriminated against you because of race until 1976 when indeed you filed precisely the same complaint with the EEOC in 1972.

DR. FRANCIS-SOBEL: Your Honor, if you would read my statements, what I am alleging and what I specifically say is that I was not aware of the facts which would support this cause of action. One does not file a

complaint with the EEOC in terms of coming to court. That is not the object, and indeed in my position, that is the last thing I wanted.

The object of filing a complaint with the EEOC is to initiate and trigger the investigatory procedures of the EEOC so as to accumulate the facts which would support a cause of action in court. The words "cause of action" to me are not a part of my regular vocabulary, and I have attempted to use those words as I have understood them. I do believe that 1981, in order for me to derive or in order for this Court to grant the benefits of 1981, which I am asking for, I have to prove intent to discriminate. Intent to discriminate. And I think that the concealment with regard to the Count I job was intent to discriminate.

There was concealment of the job from me. There was an effort — there was an employment of a person who was not qualified in terms of the money — in terms of the money, you Honor, there was misfeasance of monies. * * *

But with regard to concealment, I would like to call you Honor's attention to an affidavit which I brought before this Court on January 11th with regard to the evaluations of the laches defense on *(sic)* Plaintiff's claims. * * *

[INCLUDED IN THAT AFFIDAVIT WAS A MEMO DATED MAY 8, 1972. THE CONTENTS OF THE MEMO DATED MAY 8, 1972 WAS READ FOR THE RECORD. SEE MEMO OF RECORD TO STANLEY L. FREEMAN, APPENDIX A.]

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THE COURT: * * * Is there anything else you wish to say on this, Dr. Sobel?

DR. FRANCIS-SOBEL: Yes, there is I, as I said, was very upset when I —

THE COURT: The Court is going to recess for ten minutes and return.

(Recess taken from 4:45 o'clock p.m. to 5:00 o'clock p.m.)

DR. FRANCIS-SOBEL: I just have a few more comments with regard to the University Defendant's allegations.

We will argue, or the Plaintiff will argue, that *Curran* does not apply here because —

THE COURT: That what does not apply?

DR. FRANCIS-SOBEL: That *Curran* and *Portland* does not hold in this matter with regard to the statute of limitations, and I think that that is important to this —

THE COURT: Well, there will be opportunity to argue that in the event of a motion to dismiss.

DR. FRANCIS-SOBEL: Yes, but because we will do that, we — I think it's important to note that there is no reason for the Court to believe that I have purposely made fraudulent and sham statements.

THE COURT: The Court is not suggesting that you have purposely and deliberately made false or sham statements.

DR. FRANCIS-SOBEL: The University lawyers are, though.

THE COURT: The Court is under the impression, frankly, that the concealment of which you speak is not the type of concealment which is of significance as far as the statute of limitations problem is concerned, but there will be opportunity at some subsequent time to explore that more fully.

DR. FRANCIS-SOBEL: To explore that.

What I would like to say is that I, as I have said — there are errors in this Complaint, there were sloppy errors, there were typing errors, and what I have done is gone through the Complaint and rid the Complaint of all of those.

Thus, I have in my hands a document which is structurally the same document * * *

THE COURT: Is this another amendment?

DR. FRANCIS-SOBEL: This is to get out all of the problems which the Defendant lawyers had indicated, to relieve this Complaint of all the things which would burden —

THE COURT: Is this a Second Amended Complaint?

DR. FRANCIS-SOBEL: This is the Second Amended Complaint.

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THE COURT: Which you are filing at this time?

DR. FRANCIS-SOBEL: Which I would like to file at this time.

* * *

DR. FRANCIS-SOBEL: So what I have tried to do is I have tried to relieve the burden of this Complaint. This is a pleading which sets forth twenty counts against 37 defendants and that we are talking about six actions which took place over a period of five years. Plaintiff is not a lawyer so Plaintiff had to use some type of models to figure out how to do this, and then let me say that this is not a simple matter. Racial discrimination in society is not a simple matter. Actions which take place over five years, seven or six different actions, cannot be set down simply, and as one looks through the law books, one does not find any references as to how to set forth these actions.

* * *

MR. GRIMES: Your Honor, are you giving her leave under Rule XV to file such an amended Complaint?

* * *

THE COURT: Just a moment, Dr. Sobel. Frankly, the Court sees no alternative other than to grant the Defendant leave to file the Second Amended Complaint. As a matter of fact, no responsive pleading has been filed, and the Court understands she could do so without leave of Court under the Rule, * * *

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MR. GRIMES: I will leave it to the Court's discretion. I can't speak for my Brother, Mr. DeMarco.

MR. DeMARCO: Thank you, Counsel.

THE COURT: You have been rather left out —

MR. DeMARCO: Yes, your Honor, if I may be heard.

THE COURT: — in left field.

MR. DeMARCO: On the question as to what is to be done as far as these motions are concerned, as you are aware, the Equal Employment Opportunity Commission defending its District Director in Boston, Mr. Ware, is kind of in the middle of all this. We have filed motions to dismiss and we have asked the Court to consider that separately from the other matters which the other parties have been arguing over this afternoon before you. We are in an entirely different situation. * * *

THE COURT: Does the Court have to have some record as to the nature of Mr. Ware's responsibilities and duties before the Court can determine how his position fits into the Court's analysis?

MR.DeMARCO: Your Honor, if the Court desires that, the defense counsel will certainly provide it; however, let me say this, our regulations which have been set forth for the Court in the brief, do provide a description of his duties. * * *

It is my belief that there is nothing further needed, your Honor. I think it's all spelled out there. The Statute —

THE COURT: Do you analogize his position to that of an Administrative Law Judge?

MR. DeMARCO: Absolutely, your Honor, that's exactly the argument that we would make, yes, sir. * * *

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THE COURT: Dr. Sobel?

DR. FRANCIS-SOBEL: Of course, your Honor, I don't agree, and it's not surprising.

First, I don't agree that I have stipulated to counsel that there was an investigation. * * *

THE COURT: Dr. Sobel, the EEOC, and specifically Mr. Ware, found probable cause with respect to one of your charges.

DR. FRANCIS-SOBEL: With respect to — yes, with respect to one of the events of the 1972 charges.

THE COURT: How in those circumstances — what caused you to feel that he is racially motivated or discriminating?

DR. FRANCIS-SOBEL: First, your Honor, the letter—

THE COURT: I understand your certain allegations against the University of Maine, but as far as Mr. Ware is concerned, he is the EEOC employee who found in your favor on one — he found in four or five complaints they

had no jurisdiction because it was prior to 1972, as I recall, and the three remaining Complaints, and he found two of them that there were probable cause.

DR. FRANCIS-SOBEL: Only one, your Honor.

THE COURT: And, as to those he didn't find probable cause, you were advised by the EEOC that you had a right to bring suit. I wonder why you are pursuing Mr. Ware?

DR. FRANCIS-SOBEL: Yes, yes, and my problem, your Honor, stems from the way my Complaint was handled. That's what my problem stems from.

I do not basically foresee, or I do not see that the way — the procedures which Defendant Ware used to handle my Complaint, Number One, they were not in accord with the procedures of the EEOC.

THE COURT: Frankly, and I am serious about his, Dr. Sobel, I do not see how you were prejudiced because you had the right to bring an action in this court regardless of what action Mr. Ware took.

DR. FRANCIS-SOBEL: Your Honor, what we are — yes, and I will try to explain how I am prejudiced.

I filed the Complaints in '74, two Complaints in '74, indeed, I filed two Complaints in '74, and those two Complaints had complained of the actions which are in Count IX and thereafter of my Complaint. Those Complaints were filed in '74, in May of '74, or were filed by that time, and by that time therefore Defendant Ware knew of — knew of the previous employment discrimination I experienced, knew that there was a conspiracy to deny me —

THE COURT: Just how were you prejudiced, quickly?

DR. FRANCIS-SOBEL: I will go on, your Honor.

THE COURT: Well, quickly.

DR. FRANCIS-SOBEL: Yes, I'm sorry.

I filed them in '74 and for two years there was no response to my filings. Defendant Ware has now placed in a public document a statement which I consider an attack upon my good name, my reputation, my honor and my standing in the community. Defendant Ware was not authorized to issue a determination on any of the Complaints which I filed in '74.

THE COURT: All right, thank you.

MR. DeMARCO: Your Honor, the reason why the Commission desires to have Mr. Ware dismissed from the case is * * *

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THE COURT: But, Dr. Sobel, you have not persuaded this Court that any action taken by Defendant Ware, as alleged in Count XIX of your Second Amended Complaint, which the Court has just reviewed, deprived you of any constitutional right, and the Court is sufficiently persuaded that there's no proper basis for this asserted cause of action under Section 1985 against this EEOC official.

DR. FRANCIS-SOBEL: Well, I wish the Court would give me the time to produce evidence which would indicate that I did have some protected interests and that those interets have been violated. I consider my good name, my reputation and my honor and standing in the community interets which are protected by the Fifth Amendment. When those things are attacked, I have lost something.

THE COURT: Where did this notice go? It went to you?

DR. FRANCIS-SOBEL: Oh, no, it went to the University Defendants and Defendant Ware knew that that notice, if I were ever going to ever go to court on any action,

that notice would become a matter of public record for I would have to submit that. Now he had an alternative. * * *

THE COURT: Is there anything further, Mr. DeMarco?

MR. DeMARCO: Your Honor, only that we construed her Complaint as saying that she has a *Bivens* type of action under the Federal question statute; that she is alleging we have deprived her of some constitutional right in addition to the 1985 action, and it is our position that there is no such action available to her in this instance.

DR. FRANCIS-SOBEL: And it is my position, your Honor, that I have been deprived of my good name, my reputation and my standing in the community by the issuance of an illegal determination which infers that I have no — I had no reasonable cause to make my charges, and I consider that a false attack on my reputation and honor.

THE COURT: There is presently before the Court the motion of the Defendant Everett Ware to dismiss the action as against him on the ground that this Court lacks jurisdiction over the subject matter of the action, and on the further ground that the Plaintiff has failed to state a claim upon which relief can be granted. The only Count in the Second Amended Complaint, as in the First Amended Complaint, which charges the Defendant Ware is Count XIX which alleges that he was party to a conspiracy with various of the University Defendants to deprive the Plaintiff of certain constitutional rights, the claim being asserted pursuant to 42 USC, Section 1985. Almost every Federal Court which has ruled on the question has held that Section 1985 does not provide a jurisdictional basis for an action against a Federal official.

This Court, in the absence of controlling authority, is not prepared at this time to so rule. In any event, construing Count XIX as asserting a *Bivens* cause of action based directly upon the Fifth Amendment, as well as a conspiracy claim under Section 1985, the Court cannot find in this Complaint any allegation sufficient to state a claim upon which relief can be granted as against that Defendant. Whether that Defendant is entitled to the absolute immunity of Federal officials, such as Administrative Law Judges under *Butz* or whether that Defendant is entitled only to the qualified immunity of *Scheuer v. Rhodes,* and related cases, there is no sufficient allegation in this Complaint which would permit this Court to infer that the actions of the Defendant Ware in any way deprived the Plaintiff of any constitutional right.

The motion of that Defendant to dismiss the Complaint as against him is therefore granted, and the Court will so endorse the original motion. * * *

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment to the United States Constitution provides in part:

> Congress shall make no law. . .abridging . . .the right of the people. . .to petition the government for a redress of grievances.

2. The Fifth Amendment to the United States Constitution provides in part:

> No person shall. . .be deprived of life, liberty or property without due process of law. . .

3. The Fourteenth Amendment to the United States Constitution provides in part:

> . . .No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

4. Section 1985 of Title 42 of the United States Codes which creates appellant's direct cause of action against appellee, Everett O. Ware, provides, in pertinent part:

> §1985(3) If two or more persons in any State. . .conspire for the purpose of depriving either directly or indirectly, any person. . .of equal protection of the laws or of equal privileges and immunities under the laws; or for the purpose of presenting or hindering the constituted authorities of any State or Territory the equal protection of the laws; . . .in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done,

> any act in furtherance of the object of such conspiracy, whereby another is injured in his person or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

5. Section 1981 of Title 42 of the United States Codes which creates constitutionally protected rights which were meant to be protected in the federal courts provides, in pertinent part:

> §1981 All persons within the jurisdiction of the United States shall have the same right in every State. . .to make and enforce contracts, . . .and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . .

6. Section 2000d of Title 42 of the United States Codes which creates constitutionally protected rights which were meant to be protected in the federal courts provides, in pertinent part:

> §2000d No person in the United States shall on the ground of race, color or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

7. Section 2000e et seq. of Title 42 of the United States Code which creates constitutionally protected rights which were meant to be protected in the federal courts provides, in pertinent part:

> §2000e-5(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as

set forth in section 703 or 704 of the title.

§2000e-5(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . .alleging that an employer. . .has engaged in an unlawful employment practice, the Commission shall serve notice of the charge. . .on such employer. . .within ten days and shall make an investigation thereof. . .If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved. . .If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice. . .

§2000e-6(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination whether filed by or in behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

8. Part 1600 et seq. of Code of Federal Regulations which contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of Title VII of the Civil Rights Act of 1964 provides, in pertinent part:

§1601.5 The Commission will receive information concerning alleged violations of this title

from any person. Where the information discloses that a person is entitled to file a charge with the Commission, the appropriate office will render him assistance in the filing of a charge.

§1601.8 Such charge shall be in writing and signed, and shall be sworn before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths and take acknowledgments. Charge forms are available to all persons from all offices of the Commission. Appropriate assistance in filling out forms will be rendered to aggrieved persons or persons filing charges on their behalf by personnel of the Commission.

§1601.13(a) Within ten days after filing a charge in the appropriate Commission office, the Commission shall serve respondent a copy of the charge, by mail or in person except when it is determined that providing a copy of the charge would impede the law enforcement functions of the Commission. Where a copy of the charge is not provided, the respondent will be served with the nature of the charge within ten days after the filing of the charge (including the date, place, circumstances and identity of the person filing the charge or, in the case of a charge filed on behalf of any individual or individuals, the identity of the person or organization so filing).

§1601.13(b) The District Directors, the Commission's Director of the Office of Compliance Programs, and the designated representative of each are hereby delegated the authority to issue the notice described in paragraph (a) of this section.

§1601.14 the investigation of a charge shall be made by the Commission. . .As part of each investigation. . .the aggrieved person. . . shall be offered an opportunity to submit a statement of its position or evidence with respect to the allegations.

§1601.19b(d) The District Directors. . .on behalf of the Commission, may upon completion of an investigation, dismiss charges, make and approve conciliation agreements in those cases where such authority has been delegated to them by the Commission. . .

Supreme Court, U.S.
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No. 79-212

In the Supreme Court of the United States

OCTOBER TERM, 1979

MILDRED FRANCIS-SOBEL, PETITIONER

v.

UNIVERSITY OF MAINE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 35-39) is reported at 597 F. 2d 15. The district court did not issue an opinion.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1979. Petitioner sought and obtained an extension until June 4, 1979, in which to file a petition for rehearing in the court of appeals.

On June 1, 1979, petitioner moved the court of appeals for permission to file a petition for rehearing in excess of ten pages. See Fed. R. App. P. 41(b). This motion was denied. Petitioner then attempted to file a 68-page

petition for rehearing in the court of appeals, but it was returned to petitioner for failure to eomply with the ten page limit of Rule 41(b).

The petition for a writ of certiorari was filed on August 9, 1979, 98 days after the judgment was entered in the court of appeals. Because there was no timely filed petition for rehearing in the court of appeals, the petition for a writ of certiorari is out of time under 28 U.S.C. 2101(c). It therefore "must * * * be denied for want of jurisdiction." *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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